Law Enforcement Digest

September 2002

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UNITED STATES SUPREME COURT

RANDOM CONSENT REQUESTS UNDER DRUG INTERDICTION PROGRAM ON INTERCITY BUSES IN FLORIDA – NO FOURTH AMENDMENT "SEIZURE" OCCURRED, AND CONSENT TO SEARCH WAS VOLUNTARY, EVEN THOUGH OFFICERS DID NOT ADVISE OF RIGHT TO NOT ANSWER QUESTIONS OR OF RIGHT TO REFUSE CONSENT

U.S. v. Drayton and Brown, 122 S. Ct. 2105 (2002)

LED INTRODUCTORY EDITORIAL COMMENT: Ordinarily, we place our comments on decisions at the end of the LED entry. However, because we feel that the U.S. Supreme Court has gone further under the Fourth Amendment in allowing police random consent-search requests than would our Washington courts under article 1, section 7 of our Washington constitution, we make this comment at the outset of this entry. We think, based on a reading-together of several Washington precedents, that it is quite likely that the Washington appellate courts would hold that a drug interdiction program on buses in

Washington would be subject to restrictions beyond those imposed under the Fourth Amendment. Those troubling precedents include: State v. Ferrier, 136 Wn.2d 103 (1998) Oct. 98 LED:02 (knock-and-talk consent-search request at residence requires special warnings); State v. Cantrell, 70 Wn. App. 340 (Div. II, 1993) Oct. 93 LED:21 (consent request following issuance of traffic ticket constituted unlawful seizure where citizen was not told he was free to leave after ticket was issued); and State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) March 93 LED:09 (consent request of a citizen on the street was an unlawful seizure where citizen was not told he was free to leave and free to refuse consent).

Our guess, based on these precedents and others in Washington, is that officers conducting random, suspicion-less sweeps such as that at issue in Drayton would be required to tell each bus passenger contacted that the passenger is free not to respond to the officers and has a right to refuse consent to search.

Facts:

During a scheduled stop in Tallahassee, Florida, the driver of a Greyhound bus allowed three police officers to board the bus as part of a routine drug and weapons interdiction program. The officers were in plain clothes, with visible badges and concealed firearms.

One officer knelt on the driver's seat, facing the rear of the bus, while another officer, Lang, stayed in the rear, facing forward. Officer Lang worked his way from back to front, speaking with each individual passenger as he went. To avoid blocking the aisle, Officer Lang stood next to or just behind each passenger with whom he spoke.

Officer Lang testified that: 1) passengers who decline to cooperate or who choose to exit the bus at any time would have been allowed to do so without argument; 2) most people are willing to cooperate; 3) passengers often leave the bus for a cigarette or a snack while officers are on board; and 4) although he sometimes informs passengers of their right to refuse to cooperate, he did not do so on the day in question.

As Officer Lang approached Brown and Drayton, who were seated together, he held up his badge long enough for them to identify him as an officer. Speaking quietly and politely, he stated that the police were looking for drugs and weapons. He then asked if they had any bags. When both of them pointed to a bag overhead, Officer Lang asked if they minded if he checked it. Brown consented, and a search of the bag revealed no contraband. Officer Lang then asked Brown whether he minded if Lang checked his person. Brown agreed, and a pat-down revealed hard objects similar to drug packages in both thigh areas. Brown was arrested.

Officer Lang then asked respondent Drayton, "Mind if I check you?" When Drayton consented, a pat-down revealed objects in his thigh areas similar to those found on Brown, and Drayton was also arrested.

A further search of Brown and Drayton incident to their arrests revealed that Brown and Drayton were each wearing several pairs of boxer shorts, and that each had duct-taped packages of powder cocaine between the boxer shorts.

Proceedings below:

Brown and Douglas were each charged with federal drug crimes. They lost suppression motions in U.S. District Court in Florida and were convicted. The 11th Circuit of the U.S. Court of Appeals reversed their convictions, ruling that, because Brown and Drayton were not advised by Officer Lang that they did not have to cooperate and also that they could refuse consent to search, the consents given were the products of unconstitutional “seizures” and involuntary

consents. The federal prosecutor obtained review in the U.S. Supreme Court.

ISSUES AND RULINGS: 1) Looking at all of the circumstances – including the facts that three officers were involved, that one of the officers sat in the bus drivers' seat facing the back of the bus, and that the officer who contacted passengers did not tell them they had a right to refuse to cooperate and to refuse consent to search – was there a Fourth Amendment "seizure" of either Brown or Drayton? (ANSWER: No, rules a 6-3 majority); 2) Was each consent voluntary, despite the facts that the officers did not tell the bus passengers that they had a right to refuse to cooperate and to refuse to consent to search? (ANSWER: Yes)

Result: Reversal of 11th Circuit U.S. Court of Appeals decision, thus reinstating the U.S. District Court convictions of Clifton Brown, Jr. and Christopher Drayton.

ANALYSIS:

1) Seizure vs. mere contact

In Florida v. Bostick, 501 U.S. 429 (1991) **Sept. 91 LED:06**, the U.S. Supreme Court held that the Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to searches, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter. The Bostick Court held that the Florida Supreme Court had erred in adopting a per se rule that all such contacts are seizures. The Bostick Court remanded the case before it to the Florida courts to look at whether a seizure had occurred, based on the totality of the circumstances.

In doing so, Bostick identified as "particularly worth noting" the factors that the officer, although obviously armed, did not unholster his gun or use it in a threatening way, and that he advised the passenger that the passenger could refuse consent to a search. Relying on this last factor, the Eleventh Circuit adopted in the Drayton case what is in effect a per se rule that evidence obtained during suspicionless drug interdictions on buses must be suppressed unless the officers have advised passengers of their rights not to cooperate and to refuse consent to a search. The Supreme Court majority in Drayton disagrees, holding that the evidence was admissible under the totality of the circumstances surrounding the bus sweep.

Applying Bostick's analytical framework to the facts of these cases involving Brown and Drayton demonstrates that the police did not seize them at any point before arresting them on probable cause, the Drayton majority declares. That is because the officers gave the passengers no reason to believe that they were required to answer questions. Officer Lang did not brandish a weapon or make any intimidating movements. He left the aisle free so that Brown and Drayton could exit if they wished. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter, or would indicate a command to answer his questions, the Drayton majority asserts.

The encounter was cooperative and not coercive or confrontational. There was no overwhelming show or application of force, no intimidating movement, no brandishing of weapons, no blocking of exits, no threat, and no command, not even an authoritative tone of voice. Had this encounter occurred on the street, it doubtless would be constitutional, the majority opinion asserts. The fact that an encounter takes place on a bus does not on its own transform standard police questioning into an illegal seizure. Indeed, the Drayton majority opinion asserts, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in deciding not to cooperate on a bus than in other circumstances.

Officer Lang's display of his badge and the fact he was armed is not dispositive for the majority. It is well known that most officers are armed, and hence the presence of a holstered firearm is

unlikely to be coercive absent active brandishing of the weapon. Officer Hoover's position at the front of the bus also does not tip the scale against the government, because he did nothing to intimidate passengers, nor did he say or do anything to suggest that people could not exit.

Also, the majority asserts that Officer Lang's testimony that only a few passengers have refused to cooperate in past bus checks does not suggest that a reasonable person would not feel free to terminate the encounter. Finally, the Drayton majority rejects Drayton's argument that he was in a different circumstance than Brown. Drayton argued that a person in his position would not feel free to terminate the encounter after his companion was arrested. The Drayton majority responds that the arrest of one person does not mean that everyone around him has been seized, and that, even after arresting Brown, Officer Lang provided Drayton with no indication that he was required to answer Officer Lang's questions.

2) Consent – voluntary or not

The Drayton majority's analysis on the voluntariness-of-consent question is much more brief than its "seizure" analysis. That is because the majority views most of the facts relating to voluntariness of the contact as bearing equally on the voluntariness of the consent. In addition, the majority notes that the consent requests themselves were asked politely, and with the implication that they could be refused.

The Drayton majority notes that, under well-established Fourth Amendment consent-search precedent, officers are not required to advise citizens of their right to refuse consent to search, although the majority notes that such advice is very helpful in establishing that consent was voluntary. The totality of the circumstances showed that the consents were given voluntarily, the Drayton majority asserts. Thus, the officers had valid consents to search even though Officer Lang did not warn Drayton or Brown of their rights to refuse to cooperate or to refuse consent to search.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) "PAYTON RULE" LIMITING RESIDENTIAL ENTRY TO MAKE AN ARREST CANNOT BE IGNORED; PROBABLE CAUSE TO ARREST DOES NOT BY ITSELF JUSTIFY WARRANTLESS, NON-CONSENTING, NON-EXIGENT ENTRY – In Kirk v. Louisiana, 122 S.Ct. 2458 (2002), a unanimous U.S. Supreme Court reverses a pro-State ruling from the Arkansas appellate courts, sending the case back to the Arkansas courts to properly apply the Fourth Amendment Payton rule that requires special justification for police entry of a residence to make a warrantless probable cause arrest.

After receiving a citizen's tip, Arkansas police officers set up surveillance on Kennedy Kirk's apartment. They watched Kirk make several apparent doorway drug sales to buyers who came to his apartment door. After one of the sales, officers followed the buyer and arrested him one block from Kirk's apartment.

The officers immediately went back to Kirk's apartment, and they knocked on the front door. When Kirk opened the door, they immediately stepped inside, frisked him, and placed him under arrest. A search incident to that warrantless arrest turned up drugs and other contraband in plain view. The officers then secured the apartment and obtained a warrant for a further search of the apartment.

After Kirk was charged with drug-dealing, he moved to suppress all evidence on grounds that all evidence was the fruit of an unlawful entry of his apartment in violation of Payton v. New York, 445 U.S. 573 (1980). He argued under Payton that the officers needed -- and did not have -- exigent circumstances to justify their entry of his apartment to arrest him. At all levels in the Arkansas courts, the Arkansas courts rejected his argument (though not without dissenting

opinion), concluding that all that was needed to enter and arrest him was probable cause to arrest, which was clearly established when the arrest of the buyer was made.

The U.S. Supreme Court granted review of the case and has now reversed. The unanimous High Court states that it was clear error under Payton for the Arkansas courts not to look at the question of exigent circumstances. The Payton rule is that, in the absence of exigent circumstances, officers may not enter a person's residence (or even reach through his doorway to arrest him at the threshold when he opens the door) to make a warrantless probable cause arrest without valid consent. Nor may police lawfully order the person out of the residence in this circumstance.

Where there are no exigent circumstances, officers may not forcibly enter a person's own residence to arrest him unless officers have 1) an arrest warrant plus 2) reason to believe the person is inside the residence at the time. (NOTE: Under the U.S. Supreme Court's Steagald decision made one year after the Court decided Payton, where a *third party's* residence is involved, which was not the case here, officers without exigent circumstances may not forcibly enter the third party's residence to arrest a non-resident visitor inside without a search warrant.)

In the arguments in the U.S. Supreme Court, the Arkansas prosecutors argued that the officers did have exigent circumstances, in that the officers feared that Kirk might learn of the buyer's arrest only a block away, and that Kirk might then destroy evidence. The U.S. Supreme Court does not decide whether or not the officers did have exigent circumstances, or whether, if they did, they unreasonably created the exigency by making the earlier arrest of the buyer only one block from the dealer's apartment.

The Arkansas courts must first answer that question, the U.S. Supreme Court declares. Accordingly, the case is remanded to the Arkansas courts.

Result: Reversal of Arkansas appellate court decision affirming trial court denial of suppression; case remanded to Arkansas courts for further hearings on Payton question.

LED EDITORIAL COMMENT: We do not know enough about the facts of this case to make an educated guess whether either the U.S. Supreme Court or the often-more restrictive Washington appellate courts would find a reasonable entry on exigent circumstances in this scenario. Critical questions would be: 1) Why did the officers make the arrest at the location where they did (DID THEY UNREASONABLY CREATE THE EXIGENCY BY ARRESTING THE BUYER ON THE STREET ONE BLOCK AWAY)? and 2) Why did the officers believe that the drug-dealer would learn of that arrest before the officers had an opportunity to obtain a warrant (WAS THERE ACTUAL EXIGENCY)? Generally speaking, courts in Washington and in other jurisdictions have shown some skepticism toward police claims of exigency in these types of cases, and thus have been fairly demanding in scrutinizing the State's answers to these two questions.

(2) ORDINANCE OF OHIO VILLAGE REQUIRING NON-COMMERCIAL DOOR-TO-DOOR SOLICITORS AND CANVASSERS TO OBTAIN, CARRY, AND SHOW-ON-RESIDENT'S-DEMAND A SOLICITOR'S PERMIT HELD TO VIOLATE FIRST AMENDMENT – In Watchtower Bible and Tract Society of New York, Inc., v. Village of Stratton (Ohio), 122 S. Ct. 2080 (2002), the U.S. Supreme Court strikes down a village ordinance that required individuals: 1) to obtain a permit before engaging in door-to-door non-commercial advocacy (including religious and political canvassing), and 2) to display the permit (containing their name) upon demand. The Stratton majority concludes that the ordinance violates the First Amendment free speech protections in the manner that it impacts such activities as religious proselytizing (e.g., Jehovah's Witnesses, who were the petitioners in this case), anonymous political speech, and the distribution of petitions and handbills.

Result: Reversal of decision of Sixth Circuit of the U.S. Court of Appeals which had upheld the Village of Stratton (Ohio) ordinance.

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WASHINGTON STATE SUPREME COURT

DRIVER'S FURTIVE GESTURE AS HE PULLED OVER DURING TRAFFIC STOP HELD NOT TO BE OBJECTIVELY REASONABLE JUSTIFICATION FOR "CAR FRISK" WHERE, AFTER HEARING DRIVER'S EXPLANATION FOR MOVEMENT, OFFICER LEFT DRIVER IN CAR WHILE DOING A RADIO CHECK, AND OFFICER DID NOT CHECK INSIDE CAR OR CALL FOR BACK-UP UNTIL AFTER DRIVER HAD SUCCESSFULLY COMPLETED FST'S

State v. Glossbrener, __Wn.2d__, 49 P.3d 128 (2002)

Facts:

It was 11:45 p.m. on November 8, 1999 when a Union Gap patrol officer turned on his flashers after noticing that Glossbrener's passenger-side headlight was not operating. As Glossbrener pulled over, Glossbrener leaned over the passenger side seat. The officer approached and told Glossbrener, the only person in the car, that he had stopped him because of the unlit headlight. The officer then asked Glossbrener why he had leaned over as he came to a stop.

Glossbrener initially said that he had been reaching for his registration in his glove box, but when the officer responded that he had just observed Glossbrener retrieve his registration from his glove box after the car had come to a stop, Glossbrener admitted that in his earlier movement he had been trying to hide a beer can. The officer asked if Glossbrener had any weapons in the car, and Glossbrener said he did not. During this initial contact, the officer smelled the odor of alcohol and noticed the Glossbrener's eyes appeared to be bloodshot. The officer told him to stay in the car, and the officer returned to his patrol car to check for warrants.

After learning that Glossbrener had no warrants, the officer returned to Glossbrener. The officer asked him to get out of the car. After frisking him, the officer asked Glossbrener if he would perform some field sobriety tests. After the officer determined that Glossbrener was not intoxicated, the officer called for backup, asking Glossbrener to stand by the passenger side of the vehicle while they waited for backup to arrive.

Once backup arrived, the officer went into Glossbrener's car, checking the passenger side area where he had seen Glossbrener reaching. The officer found an open can of beer between the door and the seat. Under the floor mat, he also found a brass smoking pipe containing what appeared to be marijuana. Searching Glossbrener's person incident to arrest for possession of the marijuana, the officer found a baggie containing what later testing established to be methamphetamine. Glossbrener was not cited for the headlight or open container infractions.

Proceedings below:

Glossbrener was charged with possession of methamphetamine. The trial court denied his motion to suppress, finding that the officers were justified in checking the car based on Glossbrener's furtive gesture at the outset of the traffic stop, and that, what was discovered during the "frisk" of the car was in "plain view" and therefore properly seized. Glossbrener was convicted and he appealed. In an unpublished opinion, the Court of Appeals affirmed the trial court decision.

ISSUE AND RULING: Where, after seeing the driver lean over the passenger seat before coming to a stop, the officer heard the driver's explanation that he had been hiding a beer container, and the officer then returned to his patrol car to do a radio check for warrants, did the officer have an **objectively reasonable justification** at the point, some time later, when he conducted the "car frisk" (i.e., was the car-frisk justified where the car frisk occurred after the officer: 1) frisked the driver and found no weapons, 2) did FSTs with the cooperative

suspect and found that he was not intoxicated, and 3) only then called for backup)? (ANSWER: No, while the initial furtive gesture might have justified an immediate car-frisk, the subsequent developments dispelled any initial objective concern for officer safety).

Result: Reversal of Court of Appeals' decision which had affirmed a Yakima County Superior Court conviction of Elwood Tsugio Glossbrener for possession of methamphetamine.

ANALYSIS:

In a unanimous decision under an opinion authored by Justice Bridge, the Supreme Court agrees with the prosecutor's argument that the state and federal constitutions permit a "car frisk" of the passenger area of a vehicle when officers have "objectively reasonable justification," based on reason to believe the occupant is armed and dangerous. The Supreme Court also appears to concede that the officer in this case would have been justified if, at the outset, the officer had ordered Glossbrener out of the car, frisked him, and waited for backup to arrive to assist him in checking the area of the car into which Glossbrener had been reaching as Glossbrener pulled over in response to the officer's flashing lights.

However, under the following analysis, the Supreme Court rules, in essence, that any such "objectively reasonable justification" evaporated with ensuing developments at the scene, and that the officers no longer had such justification to do a "car frisk" at the point in time when they entered the car:

> Glossbrener finally asserts that [the officer] did not have an "objectively reasonable basis" for searching his vehicle because of the time and events that followed Glossbrener's furtive movement. Specifically, he refers to [the officer's] allowing Glossbrener to remain in the vehicle while he checked for outstanding warrants, Glossbrener's revealing a plausible reason for the furtive movement, [the officer's] frisk of Glossbrener, and Glossbrener's full cooperation during the course of the investigation. The State responds that the Court of Appeals correctly concluded that Glossbrener's furtive movement along with his "unsatisfactory" answer gave rise to a valid concern for officer safety justifying the search of the passenger area of the vehicle.
>
> [T]he same concerns for safety that justify a frisk under the Fourth Amendment … justify a limited search of the passenger compartment of a vehicle under article 1, section 7 of the Washington Constitution. In the context of a general Terry frisk, we have stated that a reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous.
>
> In the context of a protective search of a car based on officer safety concerns, the Court of Appeals has held that a "Terry stop and frisk may extend into the car if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle." In [State v. Larson, 88 Wn. App. 849 (Div. I, 1997) **Feb. 98 LED:05**] the court indicated that a "protective search for weapons must be objectively reasonable, though based on the officer's subjective perception of events."
>
> Applying this standard to Glossbrener's case, we conclude that although [the officer making the stop] may have had a reasonable belief that Glossbrener was armed and dangerous when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time he actually conducted the search because of the intervening actions of both [the officer] and Glossbrener. First, [the officer] articulated only two reasons justifying his belief that Glossbrener was armed and dangerous: (1) Glossbrener's furtive movement prior

to coming to a stop and (2) Glossbrener's initial explanation for leaning towards the passenger side of the vehicle. [Court's Footnote: *Although the State argues that the time of day of the traffic stop, approximately 11:45 P.M., also supports the reasonableness of the search, [the officer] did not testify to this as a reason for his concern regarding officer safety and neither the trial court nor the Court of Appeals relied on it in upholding the search*.] However, after being challenged, Glossbrener admitted that he had been attempting to hide an open container of alcohol, a traffic infraction. [*Court's footnote*: *At oral argument, Glossbrener asserted that it was unfair to characterize his initial response to [the officer] as a "lie" because it was unclear from [the officer's] question which movement he had been referring to -- the one prior to coming to a stop or Glossbrener's retrieval of his documentation from the glove box after stopping. However, we need not decide whether Glossbrener knowingly lied about his movements because we conclude that even if he had, at the time the search was conducted, [the officer] did not have an objectively reasonable belief that Glossbrener was armed and dangerous*.] In all other respects, Glossbrener cooperated with [the officer's] investigation, including submitting to a field sobriety test and a frisk of his person. [The officer] failed to articulate any other action by Glossbrener during the course of the investigation that made him suspect that Glossbrener was armed and dangerous.

Second, after initially questioning Glossbrener, [the officer] allowed Glossbrener to sit in his car while he checked for warrants. It would seem that if [the officer] were truly concerned for his safety, he would not have allowed Glossbrener to remain in his car while he conducted this part of his investigation.

Third, [the officer] did not find any weapons on Glossbrener's person when he did the pat-down search. Finally, it was not until [the officer] had completed his investigation and determined that Glossbrener was not legally intoxicated that he decided to call for backup in order to search the passenger area of Glossbrener's vehicle where he had seen Glossbrener reach. [*Court's footnote*: *We do not hold that it was per se unreasonable for [the officer] to wait for backup before conducting the search of Glossbrener's vehicle, but only that at the time he decided to conduct the search, [the officer] no longer had an objectively reasonable belief that Glossbrener was armed and dangerous. If [the officer] had called for backup immediately upon seeing the furtive movement or during the initial conversation with Glossbrener, the delay in searching the vehicle while awaiting the second officer's arrival may have been reasonable*.] At this point in the investigation, the only thing left was for Glossbrener to leave. Under these circumstances, we find [the officer] did not have an objectively reasonable belief that he was in danger. [*Court's footnote*: [The officer] *did not cite Glossbrener for any traffic infractions. It is unclear from the record whether he would have cited Glossbrener for the open container violation if Glossbrener had not been arrested for controlled substance violation*.]

Although the cases relied on by the State to support the reasonableness of the search in this case involved furtive movements by either the driver or a passenger of the vehicle, they are otherwise distinguishable. In [State v. Horrace, 144 Wn.2d 386 (2001) **Oct. 01 LED:04**], State v. Watkins, 76 Wn. App. 726 (1995) **April 95 LED:02**], and State v. Wilkinson, 56 Wn. App. 812 (1990), there was more than one person in the vehicle when it was pulled over. Both Horrace and Wilkinson specifically address the reasonableness of the officer's frisk of the suspect, an issue not contested in this case, not the search of the vehicle. Furthermore, in Horrace and Wilkinson, the officers articulated reasons

in addition to the furtive movements for their suspicion that the passengers might be armed and dangerous. Horrace (time of day and fact that passenger was wearing bulky jacket); Wilkinson (driver's failure to pull over right away and officer's prior knowledge of criminal activity on the part of two of the vehicle occupants). In Watkins, the specific question addressed by the court was whether the continued investigation was justified, not whether the search was justified, because the officer had seen the butt of a revolver in plain view once the suspect stepped out of the vehicle.

Most significantly, the searches in those cases were conducted at the first opportunity after the officer observed the furtive movement.

Although Larson is more similar to this case than Horrace, Watkins, or Wilkinson, it is also distinguishable. As in this case, the officer in Larson observed the driver make furtive movements before coming to a stop. However, the driver in Larson did not immediately stop when he was signaled but instead continued to drive for some distance. As in Horrace, Watkins, and Wilkinson, the search was conducted at the first opportunity following the events giving rise to the officer's concern for safety. In this case, [the officer] had several opportunities to search Glossbrener's car prior to the time the search was actually done, including the time at which [the officer] initially approached the car and before conducting the field sobriety tests.

More importantly, in upholding the search in Larson, the court specifically relied on the fact that Larson would have to return to his vehicle to obtain his registration in order to carry out the traffic stop, which in turn would give him access to any weapon he may have concealed inside the truck. In Glossbrener's case, [the officer's] investigation was complete. There was no need for Glossbrener to produce any additional documentation from the vehicle in order for [the officer] to have cited him for either the open container or headlight infraction, which was not done in this case.

We therefore hold that at the time the search was conducted [the officer] did not have an objectively reasonable belief that Glossbrener was armed and dangerous. Thus, the search was not justified based on officer safety concerns. [Court's footnote: *At oral argument the question was raised whether the search could be upheld based on the open container violation alone. RCW 46.61.519 makes it a "traffic infraction" for a person to have an open container of alcohol while operating a vehicle on a highway. Although [the officer] likely had probable cause to believe that Glossbrener had violated RCW 46.61.519, it is unclear whether an officer may conduct a warrantless search based on a violation of a civil infraction. See 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: Criminal Practice and Procedure § 2707, at 561 (1997) ("A law enforcement officer can seize any property [without a warrant] which he has probable cause to believe constitutes evidence of a crime [.]") (emphasis added). Because [the officer] was primarily concerned with hidden weapons when he conducted the search, and because this issue was not briefed by the parties or addressed by the Court of Appeals, we decline to address it now.*] Because we find the search of Glossbrener's vehicle invalid, the resulting discovery of methamphetamines on Glossbrener's person should have been suppressed as a fruit of the illegal search.

LED EDITORIAL COMMENTS

1) Police trainers agree that officers should try to take officer-safety steps as soon as

reasonably possible at the point when officers develop officer-safety concerns. We recently consulted some law enforcement trainers for their assessment of the practical, officer-safety aspects of the legal rule articulated by the Supreme Court in this case. Our understanding of the consensus view in that session is that safety concerns dictate that officers take officer-safety steps as soon as reasonably possible after they observe furtive gestures of the sort observed here (or they gather other facts which give them an objectively reasonable basis for frisking vehicle occupants or frisking vehicles or ordering occupants out of or back into vehicles). SAFETY FIRST, of course, so, even where officers make a delayed decision that their safety is compromised based on something observed several minutes earlier, officers should still act on that concern. But the better approach, both legally and in terms of officer safety and survival, is to act quickly after learning the facts of concern. Thus, the Supreme Court's analysis in Glossbrener, while a bit worrisome in the Court's micro-management-second-guessing of officer-safety actions appears to set a legal standard fairly close to the officer-safety standard taught to patrol officers.

2) Time of day remains a factor in officer-safety analysis. While the Glossbrener Court refused to consider the fact that the stop in this case was made after dark, the Court did so for technical reasons relating to what had been developed in testimony, briefing and analysis in proceedings below, not for reasons related to the substance of the law on officer-safety. While we think that the Court had sufficient support in the record to consider the fact that the stop was made in hours of darkness – see State v. Knighten, 109 Wn.2d 896 (1988) (facts of this sort in the record can be considered by Court even if litigants and courts below did not take them into account in their analysis) -- we do not think that the Glossbrener decision suggests that the time of day and the lighting at the scene are not important considerations in evaluating officer-safety measures.

Just last year, in State v. Horrace, 144 Wn.2d 386 (2001) Oct. 01 LED:04, the Court provided an excellent explanation why the time of day and lighting circumstances can be a significant factor in officer-safety analysis. Officers should make sure that they include facts pertinent to these circumstances in their reports as justification for officer-safety measures, and prosecutors should be sure to bring them out in suppression hearings and in briefing at all levels of review. We believe that Horrace demonstrates that our Supreme Court is sensitive to officer-safety needs, and we do not think that Glossbrener is evidence to the contrary. However, Glossbrener is evidence that the Court wants to see evidence in the record that officers reported and considered the objective justification for taking officer-safety measures.

Along with furtive gestures, time of day, lighting, and sighting-of-weapons, some other things that the courts consider include (but are not limited to): indicators that weapons *may be* present (such as a holster, bullets, empty-knife-sheath, etc.); the nature of the crime under investigation; intelligence regarding the suspect and/or his cohorts; whether the contact occurs in a high-crime area; bulky clothing; suspicious bulges in clothing; evasive maneuvers by the suspect before stopping for the officer; and demeanor of the suspect (e.g., hostile, agitated, apparently under the influence of alcohol, and the like, as noted with specificity in the officer's report).

3) A person released to return to his car may still pose a risk. In Michigan v. Long, 463 U.S. 1032 (1983), the U.S. Supreme Court explained that a traffic detainee may still pose a risk to officers even at the point when he is likely to be released for return to his vehicle to depart from the scene. If the person is dangerous, and if it is objectively reasonable to conclude there may be weapons in the vehicle, then officers should be able to take a look in the passenger area before releasing the suspect to get back in his car and leave the scene. The Glossbrener opinion suggests otherwise in the factual context of this case,

but we do not think that this was critical to the Court's officer-safety analysis, nor do we think that our Supreme Court gave full consideration to this point as it might impact other scenarios involving different fact patterns manifesting greater risk. We think our Court would agree with the Michigan v. Long risk analysis on this point under the appropriate fact pattern. We would hope that prosecutors would press the point in the right case.

4) Officers may wish to fill out a citation, but not issue it (or otherwise report all particulars of the infraction), where a traffic stop turns into something more serious. The Glossbrener Court points out (without explaining whether or how it is relevant to its analysis) that the officer did not cite Glossbrener for the head light infraction or open-container infraction. There are good reasons (the speedy trial rule and arguably double jeopardy concerns) for not issuing an infraction citation when a traffic stop turns into a more serious criminal matter. However, officers may want to dispel courts' skepticism in circumstances such as this by filling in a citation and sending the un-issued citation along to the prosecutor with their report (or at least by providing all of the necessary information to support a citation in their report). And it would be helpful for prosecutors to bring out in suppression hearings why the officer did not issue a citation for the infraction. See, e.g., State v. Hoang, 101 Wn. App. 732 (Div. I, 2000) Nov. 00 LED:08 (Court of Appeals affirms trial court's finding of "no pretext" and rejects defendant's assertion that officer's failure to issue citation on the spot was evidence of pretext).

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "PROPERTY OF ANOTHER" HELD UNDER FORMER MALICIOUS MISCHIEF STATUTE TO INCLUDE COMMUNITY PROPERTY DESTROYED BY A COMMUNITY MEMBER – In State v. Coria, ___ Wn.2d ___, 48 P.3d 980 (2002), the Washington Supreme Court rules, 8-1, under the former "malicious mischief" statues, that "property of another" includes community property destroyed by a community member. **[LED EDITORIAL NOTE: The 2002 Washington Legislature clarified that "property of another" does include community property under the malicious mischief statutes. See additional information at the conclusion of this LED entry.]**

In a concurring opinion not joined by any other justice, Justice Madsen asserts that the value of community property destroyed by a community member must be divided by two for purposes of determining the classification of malicious mischief committed. Justice Owens opinion for the majority (joined by six other justices) asserts that this valuation question was not before the Court in the Coria case, and the question will have to be resolved in a future case.

Justice Sanders authors a dissent (joined by no other justice) in which he argues in vain that "property of another" must, under the statutory interpretation guide known as the "rule of lenity," be viewed as not including community property.

Justice Sanders also asserts his view that "property of another" does not include community property for purposes of Washington theft statutes.

The majority opinion authored by Justice Owens does not expressly agree or disagree with Justice Sanders' interpretation of the theft statues, but on this point there is a fairly strong implication of agreement with Justice Sanders in the analytical framework of the majority opinion.

Result: Reversal of Court of Appeals' decision, thus reinstating Pierce County Superior Court

conviction of Angel Coria for malicious mischief in the second degree.

LED EDITORIAL NOTE AND COMMENT: As noted above, the 2002 Washington Legislature amended RCW 9A.48.010 by clarifying that "property of another" under the malicious mischief states includes community property for crimes committed by community members on or after March 12, 2002. See May 02 LED:3-4. We won't venture a guess here whether the value of the destroyed community property must be divided by two in order to determine the classification this remains an open question because the 2002 legislation does not address this question that was raised in Justice Madsen's concurring opinion). We will guess Justice Sanders is correct that a community member cannot be guilty of theft of community property.

(2) DV NO-CONTACT ORDER ENTERED AT ARRAIGNMENT MAY BE EXTENDED AT TIME OF SENTENCING – In State v. Schultz, ___ Wn.2d ___, 48 P.3d 301 (2002), the Washington Supreme Court rules, 5-4, that a superior court judge acted within his authority in extending, at the time of sentencing, a DV no-contact order that had previously been entered at the time of arraignment. In its concluding opinion, the Schultz majority explains:

> A no-contact order entered at arraignment under RCW 10.99.040(3) does not expire upon a finding of guilt in a domestic violence prosecution but remains in effect until the defendant's sentencing. As a sentencing condition, pursuant to RCW 10.99.050(1), the trial court may issue a new no-contact order, or it may extend the existing order by clearly indicating on the judgment and sentence that the order is to remain in effect. The no-contact order entered under RCW 10.99.040(3) at Schultz's arraignment was permissibly extended as a sentencing condition and thus remained in effect until its stated expiration date. The Court of Appeals properly affirmed Schultz's conviction for violating a validly entered domestic violence no-contact order. We affirm the Court of Appeals.

Result: Affirmance of Court of Appeals decision (reported at **November 01 LED:20**) that affirmed the Snohomish County Superior Court conviction of Karl Alan Schultz for violating a validly entered DV no-contact order.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DURESS IS NOT AVAILABLE AS A DEFENSE TO A CHARGE OF ATTEMPTED MURDER – In State v. Mannering, ___ Wn. App. ___, 48 P.3d 367 (Div. II, 2002), the Court of Appeals rules that, while RCW 9A.16.060 expressly precludes use of a "duress" defense only in murder and manslaughter cases, the intent of the Legislature was to preclude use of this defense in attempted murder cases as well.

Result: Affirmance of Thurston County Superior Court convictions of Christina Ann Mannering for attempted first degree murder while armed with a deadly weapon and first degree burglary while armed with a deadly weapon.

(2) SEXUAL CONTACT WITH ONE'S NATURAL CHILD IS "INCEST" EVEN IF ONE HAD PREVIOUSLY RELINQUISHED PARENTAL RIGHTS TO FACILITATE CHILD'S ADOPTION – In State v. Hall, ___ Wn. App. ___, 48 P.3d 350 (Div. II, 2002), the Court of Appeals rejects an incest defendant's argument that, because, when his natural daughter was five years old, he had relinquished his parental rights so that another person could adopt her, be could not be guilty of incest for having sexual contact with her when she was 16 years-old.

Result: Affirmance of Kitsap County Superior Court conviction of William Scott Hall for incest in the second degree under RCW 9A.64.020.

(3) STATE JURISDICTION TO PROSECUTE: ALASKA PRISONER COMMITTED

WASHINGTON CRIME OF THEFT OF FEDERAL DISABILITY BENEFITS -- In State v. Leffingwell, 106 Wn. App. 835 (Div. II, 2001), the Court of Appeals rules that the State of Washington had criminal jurisdiction over a defendant, who, while in prison in Alaska, committed acts of "deception" and "obtain[ed] control over property of another" by fraudulently obtaining federal disability benefits, Washington State had jurisdiction to prosecute him criminally even though he was not within the State of Washington when the acts of fraud occurred.

RCW 9A.04.030 provides in pertinent part:

> The following persons are liable to punishment:
>
> (1) A person who commits in the state any crime, in whole or in part. . . .
>
> . . . .
>
> (5) A person who commits an act without the state which affects persons or property within the state, which, if committed within the state, would be a crime.

While incarcerated in Alaska, defendant Leffingwell arranged through his brother in the State of Washington and through Mail Boxes Etc. in the State of Washington to have them receive and forward to Alaska the federal checks that he was illegally obtaining. This was a sufficient link of the defendant to the State of Washington to support jurisdiction under RCW 9A.04.030, the Leffingwell Court holds.

Result: Reversal of Pierce County Superior Court dismissal order; remand to the Superior Court for trial of Michael Luther Leffingwell on a charge of first degree theft.

(4) COCAINE SELLER'S "SCHOOL BUS STOP" SENTENCE ENHANCEMENT UPHELD OVER HIS OBJECTIONS TO METHOD OF DESIGNATION AND RECOGNIZABILITY OF "BUS STOP" - In State v. Sanchez, 104 Wn. App. 976 (Div. III, 2001), the Court of Appeals upholds a "school bus stop" sentence enhancement under RCW 69.50 for a drug dealer who challenged: (1) the method by which the school district designated the school bus stop, and (2) the lack of objective indicators that the bus stop was for school children.

In rejecting Sanchez's argument that only the school board may designate a school bus route stop under RCW 69.50.435 (a)(3), the Sanchez Court says that nothing in the statute precludes school districts from delegating this task, to the transportation supervisor (as here) or to some other agent or employee of the district. And, in rejecting Sanchez's argument that the school bus stop was not clearly marked as such, the Sanchez Court says that it was sufficient that Sanchez could have learned the location of the school bus stop by observing the gathering of school children there or by calling the school district.

Result: Affirmance of Yakima County Superior Court conviction of Jose Fernando Sanchez for delivery of cocaine and affirmance of sentence enhancement under "school bus stop" provision of RCW 69.50.435(a)(3).

(5) THEFT (FROM MOM) BY DECEPTION – EVIDENCE SUFFICIENT TO CONVICT – In State v. Mora, 110 Wn. App. 850 (Div. III, 2002), the Court of Appeals upholds the theft convictions of a husband and wife who depleted funds from several bank accounts of the husband's recently-widowed mother. The Mora Court declares that the original deception through which the two defendants induced the mother to make the son and his wife joint owner of the accounts supported the convictions for multiple counts of theft. The Mora Court rejects the defendants' arguments: 1) that they were entitled to withdraw the funds because their names were on the accounts, and 2) that each count of theft must be supported by a separate instance of a deceptive act.

Result: Affirmance of Benton County Superior Court convictions of theft (on multiple counts) against Jesse J. Mora and Machalle L. Mora; affirmance of sentences of 43 months for each defendant.

(6) THEFT CONVICTIONS AGAINST ESCROW COMPANY PRESIDENT UPHELD -- In State v. Grimes, 110 Wn. App. 272 (Div. I, 2002), the Court of Appeals rules against defendant's

appeal of three convictions for theft of federal tax law "exchange funds," rejecting his defenses, among others, 1) that federal tax deferral law preempts state criminal law, and 2) that he it was legally impossible for him to steal funds to which he had title. As to the second of these defenses, the Court of Appeals explains as follows why defendant's title to the exchange funds did not preclude his conviction for theft:

> Grimes' convictions for first degree theft were based on his stealing three clients' section 1031 funds. He contends that there was insufficient evidence to support his convictions because neither federal law, state law, nor his contractual agreements barred his conduct. Specifically, Grimes argues that he did not exert "unauthorized control" over the section 1031 exchange funds because he obtained full title to them under 26 U.S.C.A. § 1031 and the contractual agreements. This, he asserts, prevented the State from proving the "property of another" element of theft. If he had title to the property, he could not exercise unauthorized control over it.
>
> Grimes' assertion that he had full control over the property under section 1031 law is erroneous because, as the Supreme Court said in State v. Pike, "even where a person possesses legal title to a given item, theft can occur if that person takes the item from another who has a superior possessory interest." Pike, 118 Wn.2d 585 (1992). In State v. Joy, the court stated that the meaning of the "property of another" element can be derived from the definition of owner. Joy, 121 Wn.2d 333 (1993). It held that an "owner" is "a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services." The Joy court also stated that proving the "property of another" element of theft does not require proof that title must strictly be in the other person.
>
> "[I]f the particular agreement between the owner and defendant restricted the use of the funds to a specific purpose, the owner would have an interest in the money, *i.e.*, the application of the money to the purpose for which it was entrusted to defendant. . . ." [State v. Joy]
>
> And, as we stated above, the regulations governing section 1031 exchanges provide that a taxpayer retain all rights in the proceeds except use and benefit of the money or property before the exchange period ends. Because Grimes did not have full title over his clients' section 1031 accounts, the "property of another" element of RCW 9A.56.020 was satisfied.

Result: Affirmance of King County Superior Court convictions of Ted J. Grimes for theft in the first degree.

(7) FIREARM SENTENCING STATUTE VIOLATES EQUAL PROTECTION IN ENHANCING PENALTY FOR SHORT-BARRELED SHOTGUNS, BUT NOT FOR MACHINE GUNS; HOWEVER, AN UNLOADED FIREARM IS STILL A FIREARM -- In State v. Berrier, 110 Wn. App. 639 (Div. II, 2002), the Court of Appeals rules that the sentencing enhancement in RCW 9.41.310(3) violates equal protection of the laws in enhancing penalties for possession of a short-barreled shotgun but not for possession of a machine gun.

Addressing a separate issue in the case, Court of Appeals rejects defendant's argument that, because the gun was unloaded and partially disassembled, his short-barreled shotgun was not a short-barreled shotgun under chapter 9.41 RCW.

Result: Affirmance of Pierce County Superior Court convictions of Shannon Berrier for various firearms charges; remand for re-sentencing.

(8) RAPE CONVICTION UPHELD: EVIDENCE OF VICTIM'S MENTAL INCAPACITATION SUPPORTS JURY'S REJECTION OF DEFENDANT'S CLAIM OF CONSENTING SEX WITH EXTREMELY DRUNK WOMAN -- In State v. Al-Hamdani, 109 Wn. App. 599 (Div. I, 2002), the Court of Appeals holds that evidence of a rape victim's drunken state was evidence sufficient to support a jury determination that the victim was "mentally incapacitated." Accordingly, the jury's rejection of defendant's "consent" defense was supported by the evidence.

The victim testified she had ten or more drinks during the course of the evening. Her friends testified that she was stumbling, vomiting, and passing in and out of consciousness after she left the last drinking establishment. Experts estimated that her blood alcohol level was between .1375 and .21 at the time the sexual intercourse occurred. Under the following analysis, the Court of Appeals explains that these and other facts supported the jury's guilty verdict:

> As noted, Al-Hamdani does not argue that there was insufficient evidence that N.J. was unconscious during sexual intercourse. Rather, he argues that N.J.'s testimony that she woke to find him on top of her, told him "no" and "don't do that" when he asked her to engage in oral sex shows that she was not mentally incapacitated. He argues that because she was "an adult and a mother," she was aware of the nature and consequences of the act of sexual intercourse and could not be mentally incapacitated. Al-Hamdani also points to the testimony of Dr. Lawrence Halpern, who stated that excessive consumption of alcohol produces antrograde amnesia, or short term memory loss. Al-Hamdani argues that Halpern's testimony shows that N.J. could have been conscious and consented to sexual intercourse but have no memory of it when she awoke.
>
> Al-Hamdani's argument that N.J. was necessarily capable of understanding the nature and consequences of sexual intercourse was essentially rejected in Ortega-Martinez, 124 Wn.2d 702 (1994) **March 95 LED:04**:
>
> > It is important to distinguish between a person's general ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. This treatment of the two as identical contradicts the express language of the statute. RCW 9A.44.010(4) specifically notes "'[m]ental incapacity' is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse . . .." (Italics ours.) *See also* State v. McDowell, 427 So. 2d 1346 (La. Ct. App. 1983) (notwithstanding that victim, as a married woman and mother of children, obviously experienced intercourse and knew what it meant, the victim was incapable of understanding the nature of the act on the day of the act).
>
> Viewed in a light most favorable to the State, there is sufficient evidence in the record from which the jury could conclude that N.J. was so intoxicated that she was unable to understand the nature or consequences of sexual intercourse at the time it occurred. N.J. testified that, earlier in the evening, Al-Hamdani had placed her in his car and that she was only aware that staying there was a bad idea because her friend told her so. She also testified that when she woke to find Al-Hamdani on top of her "the whole thing was dream-like to me."
>
> N.J. testified that she had at least 10 drinks during the evening and possibly more. Halpern and another expert, Patrick Friel, respectively testified that her blood alcohol level at the estimated time of the sexual intercourse was .1375 and .21. Halpern testified that a person with a blood alcohol level of .15 could not

appreciate the consequences of his or her actions. N.J. testified that normally, if having sex with a man for the first time, she would do so in her bedroom, where she kept condoms, rather than in the living room without condoms. N.J. and her friend testified that N.J. was stumbling, vomiting and passing in and out of consciousness after she left the club. All of this testimony supports the determination that she was debilitatingly intoxicated at the time of sexual intercourse.

The court in Ortega-Martinez stated that:

> [a] finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse.

The jury could have reasonably found from the evidence that, despite N.J.'s previous experience and her testimony that she refused to engage in oral sex, she was incapable of meaningfully understanding the nature or consequences of sexual intercourse at the time it occurred.

Result: Affirmance of King County Superior Court conviction of Salah Al-Hamdani for second degree rape.

(9) DRIVER WAS SUBJECT TO BLOOD-TESTING UNDER IMPLIED CONSENT STATUTE WHERE HE: 1) FAILED FST'S, 2) BLEW UNDER .07 ON BREATH TEST, AND 3) ADMITTED TO RECENTLY TAKING PRESCRIBED AMITRIPTYLINE -- In State v. Baldwin, 109 Wn. App. 516 (Div. III, 2001), the Court of Appeals rejects a DUI defendant's arguments that he was not subject to blood testing for drugs under the implied consent statute.

The facts in Baldwin are described by the Court of Appeals as follows:

> On an afternoon in May 1999, Washington State Trooper David Fenn saw a motorcycle run a stop sign, swerve into the opposing lane, stop, and almost fall over as the driver got off. Trooper Fenn approached the driver, Mr. Baldwin. As Mr. Baldwin fumbled for his driver's license, the trooper noticed the odor of intoxicants on his breath and observed poor finger coordination, bloodshot eyes, and slurred speech. When asked if he had been drinking, Mr. Baldwin replied that he had drunk one glass of wine at lunch. The trooper then asked if Mr. Baldwin was taking any medications. He answered that he had taken amitriptyline the night before, that it made him tired, and that he had come home from work one day last week because the medication made him so tired.
>
> Mr. Baldwin flunked the field sobriety tests. Trooper Fenn arrested him and read him his Miranda rights. After driving Mr. Baldwin to the patrol office, Trooper Fenn read him the implied consent warnings. These warnings included notice that refusal to take the breath test could result in revocation of his license and admission of the refusal in a subsequent criminal trial. RCW 46.20.308(2). Mr. Baldwin agreed to take the BAC Verifier DataMaster breath test for alcohol. When the results showed alcohol concentration levels below .07, Trooper Fenn decided that alcohol alone could not account for Mr. Baldwin's level of impairment. Consequently, he gave Mr. Baldwin the implied consent warning again, this time specifically for a blood draw to test for drugs. Mr. Baldwin signed an agreement to take the blood test, but as he and the trooper were en route to the hospital for the test, Mr. Baldwin changed his mind, claiming fear of needles. Trooper Fenn asked him if he wanted to consult with anyone before making this decision. Mr. Baldwin said no, that he was sure he did not want to take the test. The trooper drove Mr. Baldwin home, where Mr. Baldwin voluntarily showed the

trooper the prescription for amitriptyline and agreed that a label on the bottle warned against driving and against mixing the medication with alcohol.

Baldwin was charged with DUI. The trial court denied his challenge to admission of evidence that he refused a blood test, and he was convicted.

RCW 46.20.308(2) authorizes an officer to invoke the "implied consent" statute if the officer has reasonable grounds (i.e., probable cause) to believe an arrested driver is under the influence of a drug. The officer may request that the driver submit to a blood test in this circumstance. The Court of Appeals rules that this statute applied to Baldwin's circumstances, rejecting Baldwin's constitutional and statutory challenges to the blood test.

Result: Affirmance of Spokane County Superior Court conviction of Logan C. Baldwin for DUI.

(10) FOR BLOOD ALCOHOL TEST RESULT TO BE ADMISSIBLE, BLOOD SAMPLE MUST BE SHOWN TO HAVE BEEN PRESERVED WITH ENZYME POISON -- In State v. Bosio, 107 Wn. App. 462 (Div. III, 2001), the Court of Appeals holds in a vehicular assault case (based on DUI) that absence of evidence that enzyme poison was added to the defendant's blood sample precluded the State from making a showing that defendant's blood sample was properly preserved.

The Bosio Court explains its ruling as follows:

> Ms. Bosio contends that the results of her blood test should not have been admitted because the State failed to establish a prima facie case that the blood samples were free from adulteration and tested in accordance with the rules of the state toxicologist. She argues that the toxicologist did not testify regarding use of a blank test, an anticoagulant or an enzyme poison, and offered no testimony to show substantial compliance with the criteria set forth in WAC 448-14-020(3).
>
> Before blood alcohol test results can be admitted into evidence, the State must present prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results. The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting or a loss of alcohol concentration in the sample.
>
> RCW 46.61.506(3) provides:
>
> > Analysis of the person's blood . . . to be considered valid . . . *shall* have been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose. (Emphasis added.)
>
> Under WAC 448-14-020(3),
>
> > (a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper shall be used.
> > (b) Blood samples for alcohol analysis *shall be preserved* with an anticoagulant and *an enzyme poison* sufficient in amount to prevent clotting and stabilize the alcohol concentration. (Emphasis by Court.)
>
> WAC 448-14-020 also requires that a blank test be run.
>
> The State argues that it satisfied the prima facie requirement as follows: [The arresting law enforcement officer] testified that two sterile vials with gray stoppers and anticoagulants in the bottom were used to collect Ms. Bosio's blood. The vials were then sealed and sent to a toxicologist. The nurse who drew

> the blood testified that she used Betadine to prepare Ms. Bosio's arm and she saw the anticoagulant white powder in the blood vials. The toxicologist testified that she ran a blank test. She also testified that she followed the Washington Administrative Code to analyze the samples. She gave a detailed breakdown of the procedures she followed on Ms. Bosio's blood test.
>
> In State v. Garrett, 80 Wn. App. 651, (1996), we held that "[t]he language of WAC 448-14-020(3)(b) is mandatory." In Garrett, it was undisputed that an anticoagulant was not added to the blood sample and this court affirmed the vacation of the defendant's conviction. Here, there was evidence that the anticoagulant was added to the blood sample. The trooper and the nurse saw the powder in the blood vial and the blood was not coagulated. However, there is no evidence that an enzyme poison was added to the blood sample. WAC 448-14-020(3) unambiguously requires that both an anticoagulant and an enzyme poison be added to the blood sample.
>
> We conclude that the State failed to make a prima facie showing that Ms. Bosio's blood sample was properly preserved. We reverse and remand for a new trial.

[Some citations omitted]

Result: Reversal of Spokane County Superior Court conviction of Heather R. Bosio for vehicular assault; remand for new trial.

(11) ONLY 1 DEFERRED PROSECUTION PERMITTED PER LIFETIME UNDER RCW 10.05.010 – In State v. Gillenwater, 110 Wn. App. 741 (Div. I, 2002), Division One of the Court of Appeals agrees with Division Three of the Court of Appeals that 1998 amendments to chapter 10.05 RCW prevent persons who received deferred prosecutions prior to 1998 from receiving another deferred prosecution.

Under chapter 10.05 deferred prosecution is authorized for some traffic offenses such as DUI under specified circumstances. In 1998, the Washington Legislature revised the statute to make persons eligible for only one deferred prosecution (previously, the statute expressly allowed one deferred prosecution every five years.) The Gillenwater Court agrees with the decision in Walla Walla v. Topel, 104 Wn. App. 816 (Div. III, 2001) **Feb 02 LED:23** that RCW 10.05.010 limits a person to just one deferred prosecution in his or her lifetime. Because each of the defendants in the consolidated cases in Gillenwater had received a deferred prosecution in 1989 for DUI, they were not entitled to deferred prosecutions following their respective arrests in 1999 for DUI.

Result: Affirmance of King County Superior Court RALJ decisions that Heidi Gillenwater and Robert Sell were not eligible for deferred prosecution on their DUI charges.

(12) SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE OF STRIKER/GREENWOOD VIOLATED WHERE PROSECUTION WAS DELAYED ON ONE OF THE TWO CRIMES ARISING FROM SAME CRIMINAL EPISODE – In State v. Kindsvogel, 110 Wn. App. 750 (Div. III, 2002), the Court of Appeals rules that, where a domestic violence victim showed the responding police officers the DV violator's basement marijuana grow operation, the speedy trial/speedy arraignment period for charges relating to marijuana manufacture began when the defendant was arraigned on the gross misdemeanor DV assault charge. That is because, under Washington's speedy trial/speedy arraignment rule of CrR 3.3, if multiple charges arise from the same criminal episode, then generally the time-for-trial begins to run for all criminal charges at the time when defendant is first arraigned on any of the criminal charges.

Result: Reversal of Spokane County Superior Court conviction of Kirk R. Kindsvogel for manufacture of the controlled substance of marijuana; charge dismissed.

LED EDITORIAL NOTE: Law enforcement officers may wish to confer with their local

prosecutors for guidance and specifics of the speedy trial rule applied by the Kindsvogel Court.

(13) UNDER DIRECT-CAUSE ANALYSIS, 12-YEAR-OLD WHO POSSESSED STOLEN CAR MUST PAY RESTITUTION FOR DAMAGE CAUSED BY HIS 9-YEAR-OLD BROTHER - In State v. Donahoe, 105 Wn. App. 97 (Div. III, 2001), the Court of Appeals rules that the following facts justify imposing a restitution sentence on a 12-year-old joyrider:

> Bobby forced a screwdriver into the ignition and started the engine of a car stolen by others. After a short, erratic drive, Bobby got out. Bobby's nine-year-old brother, Steven, then took the wheel. The car shot forward and hit a fence and garage.

RCW 13.40.190(1) provides: "In its dispositional order, the court shall require the respondent to make restitution to any persons who have suffered loss or damage as a result of the offense committed by the respondent." (Emphasis added) The Donahue Court holds that there was sufficient evidence that the damages to the fence were the "result of" Bobby's crime. The Court rejects the following arguments by the defendant: (1) that damage to the fence and garage was not a foreseeable consequence of possessing a stolen car; and (2) that the owners of a damaged fence are not "victims" of a car thief as contemplated by the restitution statute. The Donahue Court declares 1) that forseeability is not part of the test for imposing restitution, and 2) that the restitution statute extends beyond direct victims of a crime.

Result: Affirmance of Spokane County Superior Court restitution order against Bobby Donahue.

(14) JUVENILE CODE AUTHORIZES SENTENCE OF RESTITUTION FOR VICTIM'S COUNSELING COSTS IN RELATION TO ASSAULT IN THE FOURTH DEGREE – In State v. J.P., 111 Wn. App. 105 (Div. I, 2002), the Court of Appeals rules that the juvenile code broadly allows for restitution sentences to require payment for victims' counseling in relation to a broad range of crimes, including the crime of assault in the fourth degree.

Result: Reversal of King County Superior Court order denying restitution in juvenile case involving J.P. (DOB 12/05/85).

(15) RUNNING OF INTEREST ON RESTITUTION CANNOT BE DELAYED BY SENTENCING COURT – In State v. Claypool, 111 Wn. App. 473 (Div. III, 2002), the Court of Appeals overturns a trial court judge's order that interest on restitution would not begin to accrue until the defendant was released from custody. The Claypool Court rules that RCW 10.82.090 provides that interest runs on a restitution obligation from the date of judgment, and the trial court has no power to stay the obligation.

Result: Reversal of Spokane County Superior Court order and remand with direction to strike the language deferring interest on Dean Charles Claypool's restitution obligation under a judgment and sentence following his guilty plea on an assault-two charge.

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ATTORNEY GENERAL OPINION

AGO 2002 NO. 4 ADDRESSES SOME ASPECTS OF THE MEANING OF "CONVICTION" UNDER RCW 9.41.040 -- LED PROVIDES CLARIFICATION ON ONE POINT

In Attorney General Opinion (AGO) 2002 No. 4, the Attorney General's Office formally opines that the general provisions of RCW 9.95.240, 9.94A.640, 9.96.060 and 9.96.010 (addressing restoration of civil rights following sentencing and vacation of sentence in certain circumstances) do not themselves restore a person's firearms rights under chapter 9.41 RCW. AGO 2002 No. 4 is accessible at the website: http://www.wa.gov/ago/opinions/opinion_2002_4.html

Under the "brief answers" at page 1(second paragraph), as well as in the single paragraph under question 2 at page 7, there are statements that are in need of clarification. The problems in each place are the same. Each contains a similarly overbroad statement regarding a point that was not the focus of the questions posed or of the opinion. That overly broad statement concerns the breadth of preclusion from court-ordered restoration of firearms rights for a person who was convicted of one of the "enumerated crimes" listed in the *first* "notwithstanding clause" of the first paragraph of subsection (4) of RCW 9.41.040.

AGO 2002 No. 4 indicates in these two places in the opinion that a person with a conviction for one of the "enumerated crimes" listed in the first "notwithstanding" clause of the first paragraph RCW 9.41.040(4) can get relief "only through a pardon." In fact, a person *may* petition for restoration of firearms rights under RCW 9.41.040(4)(b) if the person has a conviction for one of the crimes enumerated in the first "notwithstanding clause" of the first paragraph of subsection (4) of RCW 9.41.040, so long as the conviction is not, per the second "notwithstanding clause" of the first paragraph of subsection (4), for a Class A felony or for a sex offense prohibiting firearm ownership. There is no plan for issuance of a corrected AGO 2002 No. 4, but the AGO author/opinions' chief has approved this LED clarifying explanation.

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ORDER FORMS FOR SELECTED RCW PROVISIONS

Order forms for 2001 selected RCW provisions of interest to law enforcement are available on the Criminal Justice Training Commission website on the "Professional Development" page. The direct link to the order form is [http://www.wa.gov/cjt/forms/rcwform.txt].

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A new website at [http://legalwa.org/] includes Washington State Supreme Court opinion from 1969 to the present. It also includes links to the full text of the RCW, WAC, and 70 Washington city and county municipal codes. Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; E mail [dtangedahl@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is published as a research source only. The **LED** does not purport to furnish legal advice. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].